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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

File: [REDACTED] Office: Texas Service Center

Date: **MAY 29 2003**

IN RE: Petitioner: [REDACTED]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment or that he would meet the employment generating requirements.

On appeal, counsel argues that the petitioner invested \$500,000 in a new commercial enterprise that has generated 16 new jobs. The petitioner submits photographs of remodeling and a one-page business plan. In addition, counsel requests 90 days in which to submit a brief and/or additional evidence. Counsel dated the appeal April 15, 2002. On February 12, 2003, this office advised counsel that no additional materials had been received. As of this date, this office has received no further submissions. The appeal will be adjudicated on the record.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, he need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs or, in the case of a troubled business, the maintenance of 10 jobs.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

The petitioner indicated on the petition that he was investing in Snyder, Texas, located in Scurry County. The petitioner indicated that the business was located in a targeted employment area. On June 23, 1998, the director requested evidence that the business was located in a targeted employment area. The director quoted the above regulations. In response, prior counsel asserted that Scurry County had a population of 19,038 and, thus, was a rural location. Prior counsel referenced 1997 census materials at "Tab 10." The record does not contain the 1997 census

materials or "Tab 10." In his decision, the director stated that the record contained no evidence that Scurry County is a targeted employment area and concluded that the minimum investment amount was \$1,000,000. On appeal, counsel does not challenge this determination and the petitioner does not submit any documentation regarding Scurry County. Thus, we concur with the director that the minimum investment amount in this case is \$1,000,000.

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

* * *

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service

commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

Initially, the petitioner claimed to have invested \$60,000 in November 1995 and a total of \$160,772. The petitioner submitted the articles of incorporation, filed June 27, 1996, which authorize 1,000 shares with a par value of \$1. The petitioner also submitted his personal tax return, including schedule C, reflecting that Snyder One-Stop was operated as a sole proprietorship prior to June 1996. In 1996, prior to incorporation, Snyder One-Stop incurred \$931 in costs of goods sold and \$64,486 in other expenses, many of which, like utilities, were normal operating expenses. Form 4562 reflects \$5,500 as a basis for seven-year property and \$24,390 as a basis for nonresidential real property. The form also reflects an additional \$43,500 spent on three cars used personally and for business. In addition, the petitioner submitted balance sheets reflecting \$129,852 in capital as of June 30, 1997 and August 31, 1997. A balance sheet dated November 30, 1997 lists the entire net worth of the corporation as \$41,800. Net worth is the same as owner's equity. *Barron's Dictionary of Accounting Terms* (3rd ed. 2000). Finally, the petitioner submitted numerous receipts for inventory in 1997. The purchase of inventory two years after opening the store must be considered normal operating expenses paid from proceeds.

On September 23, 1998, the director requested additional evidence of the petitioner's investment, including bank statements reflecting the transfer of funds from the petitioner to the new commercial enterprise, evidence of assets purchased for the business, evidence of money transferred or committed to be transferred to the business and evidence of any financing. In response, the petitioner submitted the company's bank statements, which fail to trace any funds back to the petitioner and the settlement documents for the purchase of property in Scurry County for \$24,612, reflecting no new loans.

The petitioner also submitted loan documents reflecting that the petitioner and his wife borrowed \$5,000 on October 23, 1995 from First State Bank for the purchase of furniture secured by the petitioner's personal certificate of deposit; \$24,000 on December 5, 1996 from Snyder National Bank for "consumer: renewal note #20937 / Operating expense" secured by certificates of

deposit; \$8,000 on February 15, 1997 from Snyder National Bank for "consumer:personal" secured by the petitioner's property; \$165,000 on December 11, 1997, from Brenco Marketing Corp. for the installation of new tanks and monitoring systems, to purchase food service equipment, and to refinance \$129,000 of loans with Snyder Bank, secured by a lien on the business property, inventory and equipment; and \$14,114 on March 15, 2000 from Snyder National Bank secured by a 1996 Jayco.

In addition, the petitioner submitted tax documentation for 1997 that is inconsistent. As stated above, the petitioner incorporated Snyder One-Stop in June 1996. Yet, in 1997, while Snyder One-Stop filed its own corporate tax return, the petitioner also claimed a loss from the business on his personal tax return, schedule C. The corporate tax return does not include schedule L, which would list the corporate equity. The petitioner did submit a new balance sheet as of December 31, 1998. This financial document provides the following information regarding equity:

Common Stock	\$1,000
Capital Due to FMV Increase	\$60,000
Retained Earnings	\$3,819
Capital Contributed – Brenco	\$50,000
Net Income (Loss)	\$40,971

The director concluded that while the \$5,000, \$8,000, and \$24,000 loans were secured by the petitioner's own assets, that amount was far below the requisite \$1,000,000 or even the claimed minimum investment amount of \$500,000.

On appeal, counsel merely states, "there is over \$500,000 invested as that term is used in the law." The petitioner submits photographs of the business before and after it was remodeled.

The director did not question that the remodeling had occurred. Rather, the director determined that the petitioner had not demonstrated a qualifying investment of \$1,000,000 or even \$500,000. We concur with the director. The balance sheets do not reflect \$500,000 in capital contributions under equity. The tax returns and receipts do not reflect \$500,000 in capital expenditures. Rather, they suggest minimal start-up costs and some renovation capital expenses, all well below \$500,000. The remaining expenses are normal operating costs.

Moreover, much of the capital expenses were financed. The loans accepted by the director as a possible source of the petitioner's alleged investment were refinanced with a loan secured by the assets of the business. Thus, the petitioner did not sustain any investment he might have made by obtaining the loans secured with his personal assets. The final loan after the refinancing occurred after the date of filing and cannot be considered evidence of the petitioner's investment at that time. While a petitioner need only demonstrate that he is actively in the process of investing, the record contains no evidence that any funds were irrevocably committed to the business at the time of filing.

Finally, we note that prior counsel, in response to the director's request for additional documentation, asserts that the assets of the business, as reflected on the balance sheets, should be considered the petitioner's personal investment. First, the petitioner's investment would be represented as equity, which is equal to assets less liabilities. Thus, considering only the assets without considering the liabilities mischaracterizes the petitioner's investment. Second, even all of the equity is not representative of the petitioner's personal investment. The December 31, 1998 balance sheet, for example, reflects capital contributed by another entity, Brenco, as well as retained earnings. The corporation's own retained profits, on which the petitioner has not personally paid taxes, cannot be considered the petitioner's personal investment. *See generally De Jong v. INS*, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997); and *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that a petitioner's corporate earnings cannot be considered the earnings of the petitioner.

In light of the above, we concur with the director that the petitioner has not demonstrated a qualifying investment of \$1,000,000 or even \$500,000.

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

(i) To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

(ii) *Troubled Business*. To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

8 C.F.R. § 204.6(e) states, in pertinent part:

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

8 C.F.R. § 204.6(e) states that:

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

In response to the director's request for additional documentation, prior counsel asserted that the petitioner had invested in a troubled business. Prior counsel stated:

The troubled business, C&W Enterprises, Inc. had been losing money for a while prior to its being sold in November 1995, and with a profit of \$2,163 for the month of October, its doors were closing.

The G/L income statement, ending October 24, 1995, which reveals a net income of \$9,511 during the ten month period of 1995. The year to date column shows the current and the prior year's figures. Each revenue item in the current year (1995) is show[ing] increasing losses with declines of 11-22%. No other records for the business were available [sic]. Compare these with the same statements for Snyder One-Stone, Inc. See Tab 2.

The petitioner also submitted a business plan.

The director concluded that the petitioner had failed to establish that the number of existing employees was and would be maintained at no less than the pre-investment level. On appeal, counsel asserts that the business has created at least 16 new jobs. The petitioner resubmits a page of the previously submitted business plan.

The record does not contain an exhibit labeled two or the G/L income statement referenced by counsel. Regardless, the petitioner must demonstrate that the company suffered a net loss over a 12 or 24 month period and that the loss was equal to at least 20 percent of the net worth of the business prior to that loss. Evidence of only 10 months of loss without evidence of the net worth prior to that loss is insufficient.

In addition, the record contains no documentation regarding the number of employees working for the business prior to the date of purchase. Thus, we cannot determine what number the petitioner must maintain. Moreover, the business plan indicates that the petitioner purchased a closed business. The Bill of Sale does not include the cost of good will or other references suggesting an operational business, such as assignment of accounts receivable and payable. Thus, the petitioner must establish the creation of 10 jobs.

The record contains a letter from [REDACTED] of Abilene Bookkeeping. She asserts that the petitioner hired a manager in 1996 and only one part-time employee, other than his wife and three daughters, in 1997. In July 1998, the petitioner hired two additional employees. Finally, according to Ms. [REDACTED] the petitioner planned to hire additional employees in October 1998 for the addition of a pizza delivery service.

The petitioner submitted a single Form W-2 for 1997, Forms 941 reflecting no wages in the first and second quarters of 1998 and a wage and withholding report for the first quarter of 1997 reflecting one employee in January, one in February, and none in March. In addition, the petitioner submitted two Forms I-9 that are unsigned by an official of Snyder One-Stop.

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho, supra*. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213.

The objectives on the first page of the petitioner's business plan project the creation of three full-time jobs and two to four part-time jobs. Section 2.2 of the plan provides: "In addition to the five [members of the petitioner's family] that work full-time in the business, recent expansion has led to the hiring of two full-time employees (July 1998) and one part-time employees [sic] (August 1998)." Finally, section 6.2 reiterates that the petitioner employs his wife and three daughters and has added two full-time employees. Without explanation, the plan states: "Our plans calls [sic] for having ten jobs in our store before the end of this year." The plan fails to provide the positions these additional eight employees will fill or provide projected hiring dates. Moreover, if the petitioner, his wife, and three daughters will hold five of those jobs, he cannot claim to have created 10 jobs for qualifying employees. Finally, counsel's assertion that the company now employs 16 full-time workers is unsupported by the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.